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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOHN T. STONE, JR. and ROY A. WUJKOWSKI,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

RICHARD MURRAY *
CHRISTIAN D. ABEL
CARMEN A. JACOBS, JR.
MURRAY, JACOBS & ABEL
601 King Street, Suite 400
Alexandria, VA 22314
(703) 739-1340
Attorneys for Petitioners

* Counsel of Record

January 4, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether the sole shareholder, director, officer and employee of a corporation is protected by the Fifth Amendment "Act-of-Production" doctrine with respect to corporate documents in his possession if such act of production would be personally incriminating to him, as that question was specifically left open by this Court in *Braswell v. United States.*

II. Whether there still exists a Constitutionally protected right of privacy which protects the contents of personal documents and records as established in *Boyd v. United States.*

III. Whether an Inspector General Subpoena which requires an individual to produce documents maintained by him "[O]n a personal and/or business basis . . ." is bad on its face under the Fifth Amendment for requiring the production of purely personal documents.

IV. Whether the District Court erred in its application on remand of the test to determine whether petitioners held pocket calendars in a personal or representative capacity, by presuming that pocket calendars submitted in response to the subpoena were corporate documents which petitioners had the burden of "converting" into personal ones and by its failure to hold a hearing.

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PETITION FOR WRIT OF CERTIORARI

John T. Stone, Jr. and Roy A. Wujkowski, Petitioners, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, filed October 6, 1992.

OPINIONS BELOW

The opinions rendered in this case, which all appear in Appendix A attached hereto, are as follows:

United States v. Stone, et al., —— F.2d —— (4th Cir. 1992), attached at (App., p. 1).

United States v. Wujkowski, et al., 929 F.2d 981 (4th Cir. 1991), attached at (App., p. 8).

Unpublished opinion of the United States District Court for the Eastern District of Virginia, dated September 11, 1992, attached at (App., p. 19).

Unpublished opinion of the United States District Court for the Eastern District of Virginia, dated July 27, 1990, attached at (App., p. 26).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was filed on October 6, 1992. This petition for a writ of certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

Inspector General Act of 1978

5 U.S.C. app. 3 § 6(a)(4):

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized . . .

(4) to require by subpoena the production of all information, documents, reports, answers, records accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, That procedures other than subpenas shall be used by the Inspector General to obtain documents and information from Federal agencies.

STATEMENT OF THE CASE

The Petitioners in this case, Roy A. Wujkowski and John T. Stone, Jr. are employees of a Maryland corporation known as Technology & Management Services, Inc. (TMS). The Office of the Inspector General (IG), Department of Energy (DOE) has been investigating TMS for several years, with the cooperation of TMS' officers. The focus of this investigation is allegations, by competitors of TMS, of fraud and bribery of DOE officials. The IG served several corporate subpoenas upon TMS. In each instance, TMS complied with the Government's request. The last corporate subpoena was objected to, in part, by the corporation because it sought the personal documents of its officers.

The IG then served subpoenas duces tecum upon Mr. Stone and Mr. Wujkowski, as well as the president of TMS, Mr. Charles Bendersky. All three of these subpoenas were directed to the named respondent as an individual, and all three contained the following language, or a minor variation:

> [Y]ou are hereby required to bring with you and produce at said time and place the following original documents: All original desk pocket or copies of electronic calendars, appointment books, planner schedules, and daily meeting logs maintained by or for you on a *personal* or business basis for calendar

> years 1985, 1986, 1987, and 1988, and for the first three quarters of 1989. (emphasis added).

In addition to this common language, the subpoena issued to Mr. Wujkowski requested additional material. According to this subpoena, Mr. Wujkowski was required to produce the records of his privately owned beach house, and the records of Ashford Associates, Inc., a corporation solely owned by him and of which he was the only employee. With respect to Ashford Associates, this subpoena requested various corporate records. With respect to the beach house, this subpoena requested a list of names and addresses of all people who had used or visited Mr. Wujkowski's private beach house and any correspondence reflecting the use of the beach house.

Mr. Stone, Mr. Wujkowski, and Mr. Bendersky refused to comply with their respective subpoenas, asserting their Fifth Amendment rights against self-incrimination. They asserted their Fifth Amendment rights generally, and also as to the act of producing documents specifically. The Government moved to summarily enforce these subpoenas, with the proceedings against Mr. Stone and Mr. Wujkowski being held in their resident state of Virginia, and the proceedings against Mr. Bendersky being held in his resident state of Maryland.

Judge J. Frederick Motz of the United States District Court for the District of Maryland refused to enforce the subpoena directed to Mr. Bendersky, holding that the subpoena was overbroad on its face because it specifically requested "personal" documents. (App., at p. 28).[1] Judge Albert V. Bryan, Jr., of the United States District Court for the Eastern District of Virginia ruled differently, however. He ordered Mr. Wujkowski to comply with the subpoena with regard to the request for the beach house records and the records of Ashford Associates, Inc.

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[1] The IG issued a revised subpoena. However, Mr. Bendersky died during the interim period and although the matter was pursued with his estate, no documents were ever recovered.

Judge Bryan further ordered that Mr. Stone and Mr. Wujkowski submit the calendars and diaries to the Court for an *in camera* review in order to determine if these documents were corporate or personal in nature. Mr. Stone and Mr. Wujkowski submitted the calendars and diaries to the Court for this *in camera* review, along with affidavits which stated that the documents were held in a personal capacity and that TMS had not required the documents to be maintained for corporate purposes.

Before Judge Bryan had made his *in camera* review of the calendars and diaries, the Government filed a Motion to Reconsider the *In Camera* Order. Without giving Mr. Stone and Mr. Wujkowski an opportunity to respond, Judge Bryan granted the Government's motion and released the documents to the Government. Mr. Wujkowski was further held in contempt for failing to produce the beach house and Ashford Associates, Inc. records.

The Fourth Circuit, in *United States v. Wujkowski and Stone*, 929 F.2d 981 (4th Cir. 1991) (App., p. 8) held that the District Court had erred by releasing the calendars without conducting an *in camera* review of the documents. The case was remanded with instructions to the District Court to conduct a more detailed inquiry into whether the pocket calendars and appointment books should be classified as corporate or personal documents. The District Court was also instructed to determine whether the records of Wujkowski's privately owned beach house were protected by the Fifth Amendment and whether, with respect to the Ashford Associates documents, the "Act-of-Production" doctrine protects the sole shareholder and employee of a corporation as that question was left open by this Court in *Braswell v. United States*.

On remand, the lower court held a hearing on July 26, 1991 to determine the procedure to be employed in examining the documents. During this hearing, counsel for Petitioners Stone and Wujkowski brought to the court's

attention cases cited by the Fourth Circuit in its decision which set forth the type of inquiry that should take place, and the court directed Petitioners to submit the documents *in camera*, together with affidavits.

Because the cases cited by the Fourth Circuit employed oral testimony to examine disputed documents, counsel for Petitioners inquired of the court whether an examination of the individuals themselves would be necessary if the court felt that information beyond affidavits was required to explain the contents of the calendars. The court answered affirmatively to this suggestion, and at the conclusion of the hearing again stated that, while it might not be necessary, the court may need to hear the testimony of the individuals themselves to explain the contents of the calendars. Petitioners submitted affidavits but an examination of the individuals themselves was not requested by the court.

In a Memorandum Opinion dated September 11, 1991 the District Court ruled that several entries in the calendars could not be explained based upon the affidavits alone, and for that reason held that Stone and Wujkowski had not "converted" the documents from corporate to personal. The court also held that the beach house documents (which it found to be personal documents) and the Ashford documents were not entitled to Fifth Amendment protection and ordered compliance with the IG subpoenas.

Wujkowski and Stone thereafter appealed this Order to the United States Court of Appeals for the Fourth Circuit, which affirmed the Order of the District Court.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of certiorari because this case involves a conflict among the Circuit Courts and raises important questions of federal law which have not been, but should be, settled by this Court. This case provides the Court a unique opportunity

to address the full range of issues involving Fifth Amendment protection of documents. All three categories of documents which trigger claims of Fifth Amendment Protection are contained in this single case: Documents found to be personal, documents which must be characterized as either corporate or personal, and corporate documents which may be incriminating to the sole shareholder, director and employee of a corporation. Important questions involving all three categories of documents are raised in this petition which should be settled by this Court.

I. THE FIFTH AMENDMENT ACT-OF-PRODUCTION DOCTRINE APPLIES TO THE SOLE SHAREHOLDER, DIRECTOR, AND EMPLOYEE OF A CORPORATION

Petitioner Wujkowski is the sole stockholder, officer and director of Ashford Associates, Inc. In addition, Ashford Associates, Inc. has no employees. As such, the Ashford documents fit a narrow question that was left open by this Court in *Braswell v. United States*, 487 U.S. 99 (1988).

The main holding in *Braswell v. United States* is that the custodian of corporate records cannot resist their production even if such production would be personally incriminating. *Braswell* at 108-14. The holding in *Braswell* rests upon the interrelationship between the collective entity doctrine and agency principles. The reasoning behind *Braswell*'s holding is that a collective entity enjoys no Fifth Amendment rights, and that because such an entity can only act through agents, such agents cannot assert the Fifth Amendment when they act in a representative capacity. As the Court stated:

> Artificial entities such as corporations may act only through their agents . . . and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on a proper demand by the Government.

> Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation.

Braswell at 10.

Even though it may be personally incriminating, the custodian cannot complain because it is the corporation's act which has incriminated him, not his own. Thus the holding in *Braswell* rests upon the notion that a person's act may at the same time be deemed his individual act and also the act of the corporation.

The *Braswell* Court recognized and mitigated the impact of this reasoning when it carefully limited its holding to document production. The Court was unwilling to extend the agency rationale to completely supplant the Fifth Amendment when it acknowledged that a custodian could not be compelled to give oral testimony even though the custodian held a representative position. 487 U.S. 114, *citing Curcio v. United States*, 354 U.S. 118 (1957). The Court recognized that the agency rationale of its main holding in *Braswell* would not necessarily supercede the individual Fifth Amendment rights of the custodian.

Another limitation on the agency rationale of *Braswell* occurs when the Supreme Court agreed that the Government could make no use of the "individual act" of the custodian against him, but could only make use of the corporation's act. *Braswsell* at 118.

As the Court held:

> [I]n a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian.

The agency rationale of *Braswell* allows only the corporation's act of production to be used against the individual. The custodian's individual act may not. Thus, the supremacy of the collective entity doctrine over the

individual Fifth Amendment rights of the custodian is called into question when the custodian is the sole shareholder, director, officer and employee of the corporation. In the quintessential "one man" corporation, the act of the corporation and the act of the custodian become indistinguishable. The statement that "It is only the corporation's act which may be used against him" rings hollow when the individual's act and the corporation's act are identical.

It is this collision of the Fifth Amendment with the collective entity doctrine that presents the open question of *Braswell* and which the Fourth Circuit failed to properly analyze in *United States v. Stone and Wujkowski*, —— F.2d —— (4th Cir. 1992) (App., p. 1). As was noted by the court in *United States v. Doe*, 727 F. Supp. 265, 268 (E.D. Va. 1989), "*Braswell* seems to recognize that while the act of production doctrine does not always override the general principle requiring custodians to produce documents, it may do so in some circumstances."

Those circumstances mentioned in *Doe* are the ones which arise in the question left open by *Braswell*, that is:

> [W]hether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example, that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

Braswell at 118, n.11.

The *Braswell* question was left open to determine whether the agency principles which support its main holding (with its notion that the custodian's act is deemed a corporate act) will apply when the custodian's individual act and the corporation's act are indistinguishable.

In *United States v. Stone and Wujkowski*, —— F.2d —— (4th Cir. 1992), the Fourth Circuit held that Wujkowski could not assert the Fifth Amendment "act-

of-production" privilege with respect to the Ashford documents (App., p. 6). This decision is not, however, based upon an analysis of the interrelationship between the collective entity doctrine and agency principles. The decision is based upon the more simplistic proposition that a corporation, regardless of size, cannot assert the Fifth Amendment. The Fourth Circuit does not address the question of whether a jury would inevitably conclude that it was Wujkowski who produced the records and how such a conclusion affects his claim of personal self-incrimination.

While the Fourth Circuit reached its decision without considering the agency rationale of *Braswell*, at least one court has analyzed the *Braswell* question in terms of the custodian's act being indistinguishable from the corporation's act. The question left open by *Braswell* was considered by the court in *United States v. Doe*, 727 F. Supp. 265 (E.D. Va. 1989). In *Doe*, the facts did not fall squarely within the *Braswell* reservation because the respondent was not the "sole officer and employee" of his corporation. Nevertheless, the court did set forth a two part test to resolve the *Braswell* exception. As the court stated:

> [T]he pertinent inquiry is whether, with respect to any specific document or category of documents, the act of production has any communicative aspects that may be incriminating to Doe even though the jury will not be told that he produced them—only that the corporation did so. In other words, it is a two step inquiry: (1) would a jury, told only that the corporation produced the documents, nonetheless inevitably conclude that it was Doe who had possession of them, and, if so, (2) would this give rise to any incriminating inference concerning a document's (i) existence, (ii) authenticity, or (iii) it's custody.

Doe at 270.

This test is consistent with *Braswell*'s recognition that the jury cannot be told that the custodian produced the

documents (which it would inevitably conclude with a "one man" corporation.) It is this type of analysis which the Fourth Circuit should have engaged in, and which this Court should settle on writ of certiorari.

In the present situation, the Ashford documents satisfy both parts of the above test. Because Wujkowski is the sole shareholder, officer, director, and employee of Ashford, a jury—told that the corporation had produced the documents—would inevitably conclude that he had possession of them. He is the only person who could possibly act in a representative capacity on behalf of the corporation.

The second part of the test is likewise satisfied. By responding to the subpoena, Wujkowski will be making a testimonial assertion that the documents exist, that he believes that they are the ones requested by the subpoena, that the documents are authentic and that he had custody of them. In fact, many of the documents requested by the Inspector General's subpoena are the same type which were requested by the subpoena in *Braswell*. The *Braswell* subpoena requested: "Receipts and disbursement journals; general ledger and subsidiaries; accounts receivable/accounts payable ledgers, cards, and all customer data; bank records of savings and checking accounts, including statements, checks and deposit tickets; contracts, invoices-sales and purchase, conveyances, and correspondence; minutes and stock books and ledgers; loan disclosure statements and agreements; liability ledgers; and retained copies of Form 1120, W-2, W-4, 1099, 940 and 941." *Braswell* at 101, n.1.

The Court should grant the Petition so that the question left open by *Braswell* can be resolved. A test similar to that announced in *United States v. Doe* should be adopted to determine the availability of Fifth Amendment protection in the one-man corporation situation.

II. THE *BOYD* DOCTRINE PROTECTS THE CONTENTS OF PERSONAL DOCUMENTS

In order to determine the extent to which the Fifth Amendment right against self-incrimination applies to documents and papers, courts have historically followed two different methods of analysis. The first method of fifth amendment analysis focuses upon the privacy interests of the individual and the protection given to the contents of the documents requested by the Government, whereas the second type of analysis is concerned with the testimonial significance of the act of producing the documents. The privacy based method of Fifth Amendment analysis had its genesis in the case *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746 (1886). The Court in *Boyd* established the principle that the contents of personal records are entitled to full Fifth Amendment protection. *Id.* at 633-35, 6 S. Ct. at 534; *See also United States v. (Under Seal)*, 745 F.2d 834, 838 (4th Cir. 1984), *vacated as moot*, 471 U.S. 1001, 105 S. Ct. 1861, 85 L.Ed.2d 155 (1985); *In re: Grand Jury Investigation, Special Grand Jury No. II*, 600 F. Supp. 436, 438 (D. Md. 1984); *United States v. Darwin Construction Company, Inc.*, 632 F. Supp. 1426, 1428 (D. Md. 1986).

For several years, the principles announced in *Boyd* were firmly established, with several Supreme Court decisions reaffirming *Boyd's* essential holding. *United States v. (Under Seal)*, 745 F.2d 834, 839 (4th Cir. 1984) *citing, e.g., Bellis v. United States*, 417 U.S. 85, 87, 94 S. Ct. 2179, 2182, 40 L.Ed.2d 678 (1974), ("[T]he Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony.") Dicta in more recent Supreme Court decisions indicate that there has been an erosion of the scope of the *Boyd* doctrine, with the result that at least one Circuit has gone so far as to pronounce the principle of *Boyd* to be dead. *See In Re Steinberg*, 837

F.2d 527, 528-30 (1st Cir. 1988). Such is not the case, however, in the Fourth Circuit, where it is even recognized by other Circuits that the *Boyd* doctrine is still "very much alive." *In Re Steinberg* at 529.

A. The Fourth Circuit Still Follows the Holding in *Boyd*

While several Circuits have reached the conclusion that the Fifth Amendment affords no protection to the contents of even personal documents, the Fourth Circuit has refused to reach that conclusion. In *United States v. (Under Seal)*, 745 F.2d 834 (4th Cir. 1984), the court held that without an explicit overruling of *Boyd* by the Supreme Court, the Fourth Circuit would adhere to the principle that the contents of purely personal records and documents are protected by the Fifth Amendment. *See id.* at 839. In *Under Seal*, the court distinguished the several Supreme Court cases which contain dicta attempting to limit the scope of *Boyd*. For example, the court distinguished *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976) as being a case involving a subpoena issued to a third party for the production of business records which were not written by the proponent of the privilege. The court in *Under Seal* noted that the cases which purportedly put an end to the *Boyd* doctrine did not deal with the case of a subpoena requesting an individual's incriminating personal papers, but merely "reiterated the well established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a Fifth Amendment privilege." *Under Seal* at 839.

The holding in *United States v. (Under Seal)* has been cited by several courts, and continues to express the state of the law in the Fourth Circuit. *See e.g. In re: Grand Jury Investigation*, 600 F. Supp. 436, 438 (D. Md. 1984); *United States v. Darwin Const. Co., Inc.*, 632 F. Supp.

1426, 1428 (D. Md. 1986). In fact, as recently as 1988, the First Circuit Court of Appeals noted that the *Boyd* doctrine continues to survive in the Fourth Circuit:

> Only Justice O'Connor found, at least expressly, that *Doe* "sounded the death knell of *Boyd*." 465 U.S. at 618, 104 S. Ct. at 1245 (O'Connor, J., concurring). The lower courts, interpreting *Doe* have expressed diverging opinions regarding that conclusion. The United States Court of Appeals for the Fourth Circuit has held that *Doe* merely reiterated the principle that an individual holding documents on behalf of an artificial entity cannot assert a fifth Amendment privilege to protect the contents of the documents (citation to *Under Seal* omitted). That court found *Boyd* to be very much alive and held that the Fifth Amendment prevents the Government from subpoenaing an individual's incriminating papers that are held by him in an individual, as opposed to representative, capacity.

In re Steinberg, 837 F.2d 527, 529 (1st Cir. 1988).

In the present case, the Fourth Circuit was again careful not to declare that the principle of *Boyd* was dead. In *U.S. v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991), (App., p. 12) the court limited its holding to the facts of the case. It is the position of the Petitioners that the *Boyd* doctrine still provides protection for the contents of purely personal documents in the Fourth Circuit and that such protection should be declared by this Court to be the law for all Circuits.

Because the *Boyd* doctrine would protect the contents of purely personal documents, Petitioners cannot be compelled to produce documents found to be held in a private capacity. The District Court found the beach house records to be personal. Nothwithstanding, the District Court order was upheld even though those records may contain potentially incriminating information concerning individuals who may have used the property.

B. The Supreme Court's Holding in *Bouknight* Does Not Overrule *Boyd*

The United States has taken the position that the Fifth Amendment no longer affords any protection to the contents of documents or records, even if the documents are purely personal and held in an individual, as opposed to a representative, capacity. In support of this contention, the Government cites *Baltimore City Department of Social Services v. Bouknight*, 110 S. Ct. 900 (1990). While it is arguable that this case represents another attempt by the Supreme Court to limit the scope of the *Boyd* docrine, the holding in *Bouknight* does not expressly overrule *Boyd*, which the Fourth Circuit stated in *United States v. (Under Seal)* to be a necessary condition to eliminate Fifth Amendment protection of personal papers. *See Under Seal* at 839.

The holding in *Bouknight* can be distinguished in the same manner as the prior Supreme Court cases considered by the Fourth Circuit in *Under Seal*. As was said of those decisions, "The dicta are assuredly there, but none of these decisions has overruled *Boyd*." *Id.*

The issue raised by the *Bouknight* case was whether a mother who was the custodian of her child pursuant to a court order could invoke the Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce the child. *Bouknight* at 904-909. In order to reach its conclusion, the Court analogized the mother's custody of her child to that of a custodian of corporate documents. *Id.* at 906, 907. The Court stated that "Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory scheme." *Id.* at 905. The rationale for requiring *Bouknight* to produce her child was not that she had no expectation of Fifth amendment privilege, but rather that due to the regulatory scheme, she had no right to retain what she

possessed. The Court's decision thus rested on the characterization of the mother as custodian of a thing (a child) which was the subject of a noncriminal regulatory scheme.

The situation in the present case is distinguishable from *Bouknight* on this point. The petitioners in this case are not holding the requested documents as part of a noncriminal regulatory scheme. The subpoenas have requested documents held by them in a personal capacity. The production of the child in the *Bouknight* case did not implicate the privacy interest of Mrs. Bouknight in the way that the compelled production of Stone and Wujkowski's personal papers implicate their privacy interest. Mr. Wujkowski *owned* his beach house and *owns* his private records. The privacy interest created by *Boyd* and cases such as *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) is not eliminated by the holding in *Bouknight* or *Fisher*.

The Supreme Court has never expressly overruled *Boyd* and the privacy rationale of its holding with respect to personal papers. *Bouknight*, as with many other post-*Fisher* cases, simply represents the realization of Justice Brennan's premonition in his concurrence in *Fisher* 425 U.S. 391, 415 (1976) (Brennan, J., concurring). There, Justice Brennan predicted that while the Court in *Fisher* was not overruling *Boyd*, the holding in *Fisher* would be cited as doing just that. This case presents an opportunity for the Court to address squarely whether there is a Fifth Amendment privacy interest in the contents of personal documents separate from the testimonial aspect of their production.

III. THE INSPECTOR GENERAL SUBPOENA ARE BAD ON THEIR FACE FOR SPECIFICALLY REQUESTING PERSONAL DOCUMENTS

A subpoena which is part bad is all bad. The Inspector General subpoenas in this case, on their face, request the production of documents held in a personal capacity.

Because the *Boyd* doctrine as well as the Fifth Amendment act-of-production doctrine protects personal documents, the subpoenas are overbroad and unenforceable.

A. The Subpoenas Request "Personal" Documents, Which Are Protected by the Fifth Amendment

The subpoenas issued to the Petitioners request personal documents and records. The subpoena served on Mr. Wujkowski requests the records of his privately owned property, and the subpoenas for both Petitioners specifically request the production of calendars, log books, and planners held in a "personal" capacity. Because the subpoenas, on their face, ask for "personal" records, they are unenforceable. This conclusion follows directly from the full Fifth Amendment protection under *Boyd*.

The privacy rationale of *Boyd* is not the only type of protection afforded private documents, however. It is well settled that the Fifth Amendment privilege against self-incrimination applies to documents held in a personal capacity. In *Fisher v. United States*, 487 U.S. 391 (1976), *United States v. Doe*, 465 U.S. 605 (1984) and the cases which have followed them, the Court has established the "act-of-production" doctrine which protects the communicative nature flowing from the act of producing personal documents. Under these cases, and *United States v. White*, 322 U.S. 694 (1944), personal papers receive protection under the Fifth Amendment. Because the subpoenas in this case include language that broadly requests documents held in either a "[P]ersonal and/or business basis", the subpoenas include in their scope protected personal documents as well as unprotected documents. The effect is that an overly broad category of documents must be produced by the respondent. Such overbreadth makes the subpoenas unenforceable. Under *Boyd*, all personal documents are protected unless their production would not be testimonial or incriminating. The language of the IG subpoenas is so broad that personal calendars

completely unrelated to any possible investigation would have to be produced. The "personal and/or business" language of the subpoena would cover purely personal, even household, calendars. Such a broad subpoena is not only outside the authority of the Inspector General under the Inspector General Act of 1978, 5 U.S.C. app. 3 § 6(a)(4), it is also unenforceable under the Fifth Amendment.

B. A Subpoena Which Is Part Bad Is All Bad

The Supreme Court held in *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221, 71 S. Ct. 675, 679, 95 L.Ed. 879 (1951) that "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad." *Accord*, *In Re: Grand Jury Subpoena: Subpoena Duces Tecum*, 844 F.2d 202 (4th Cir. 1988). Therefore, a subpoena which requests both protected material and unprotected material would be unenforceable. Such a subpoena would have to be quashed, and an individual should not be held in contempt for failing to comply with such a subpoena.

In the present case, Petitioners are put in the position of predetermining whether the documents requested are personal or corporate and whether the personal documents would be protected. The IG subpoena is impermissibly overbroad because the act of producing personal documents is protected by the Fifth Amendment. The defective aspect of the subpoenas make them unenforceable in their entirety.

IV. THE DISTRICT COURT IMPROPERLY PRESUMED THAT THE POCKET CALENDARS WERE CORPORATE DOCUMENTS

The documents which are disputed in this case include pocket calendars maintained by Stone and Wujkowski.

It is their contention that they maintained these calendars in a personal capacity. The calendars were submitted *in camera* due to the fact that the IG subpoena requested calendars "maintained or kept on a *personal* and/or business basis . . ." (emphasis added).

Upon remand to the lower court, the Fourth Circuit in *U.S. v. Wujkowski* directed that "the District Court must conduct a more detailed inquiry into whether the pocket calendars and appointment books in this case should be classified as corporate or personal." *Id.* at 984.

To assist the District Court in its inquiry, the Fourth Circuit provided a list of factors to aid in assessing whether a document should be classified as corporate or personal. It noted that "carrying out this inquiry will insure that a few personal notations scrawled in an obvious corporate document will not convert the document into a personal one and at the same time insure that every writing made by a corporate executive is not transformed into a corporate document." (App., p. 15).

The burden was placed upon Wujkowski and Stone to prove the nature of the documents, however the documents were not presumed to be either corporate or personal in nature. As the Fourth Circuit stated, "We cannot state categorically that such things as appointment books, day planners, and pocket calendars are intrinsically either corporate or personal in nature." *See also In Re: Sealed Case*, Slip Opinion 91-3088 and 91-3089 (U.S. App. D.C. 1991). The District Court, however, erroneously concluded that the pocket calendars were presumed to be corporate documents. In its Memorandum Opinion dated September 11, 1991 (App., p. 19) the District Court held that the Petitioners had not demonstrated enough to "convert the documents into personal ones" (App., p. 21). The opinion in *U.S. v. Wujkowski* does not state that there is a rebuttable presumption that the documents are corporate documents which the Petitioners have to "convert" into personal

ones. To the contrary, the opinion in *Wujkowski* holds that the documents are neither intrinsically corporate nor personal in nature.

The Fourth Circuit erred by affirming the District Court and its presumption that the pocket calendars were presumed to be corporate documents. The court in *U.S. v. Stone*, —— F.2d —— (4th Cir. 1992) (App., p. 4) states, in discussing the District Court's findings, "It found that there were some unspecified entries [in the calendars but not enough *to alter the character of the documents as business ones.*" (emphasis added). Both the Fourth Circuit and the District Court applied an incorrect standard of review in this case. The Petitioners do not have the burden of "Altering" the character of the documents as business ones. Because the subpoenas requested calendars held in *either* a personal or business capacity, the District Court should be required to determine the capacity in which the documents are held with no burden on the Petitioners to alter the character of the documents. In the present case, the District Court never made a finding that the calendars were corporate documents, just that petitioners did not meet this burden.

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW PETITIONERS TO TESTIFY

In its *Memorandum Opinion*, dated September 11, 1991, the District Court bases its decision that the calendars are unprotected entirely on the finding that several entries are unexplained. The test articulated by the Fourth Circuit in *Wujkowski* required that the District Court balance several factors, only one of which was the nature of the contents of the calendars. Despite the fact that the District Court found that Petitioners had actually established several of these factors which tended to show that the calendars were held in a personal capacity,

the District Court concluded that Petitioners had not converted the documents into personal ones.

This finding was based exclusively upon the court's conclusion that Petitioners did not adequately explain several entries in the calendars. Why this factor outweighed the others was not articulated by the court. Despite the importance that the District Court placed on this factor, the court did not allow the Petitioners to testify as to the nature of the contents of the calenders.

Upon remand, the District Court held a hearing on July 26, 1991 to discuss the procedure to be employed in the examination of the documents. During this hearing, counsel for Petitioners raised the cases cited in *Wujkowski* as an appropriate method of examination. The 4th Circuit in *Wujkowski* had adopted the Second Circuit test and had cited with approval *In Re Grand Jury Subpoena d. April 23, 1981*, 522 F. Supp. 977 (S.D. N.Y. 1981), a case which had implemented this test on pocket calendars.

During this hearing, the court ordered Petitioners to submit the documents to the court, *in camera*, together with supporting submissions. Counsel for Petitioners raised the possibility, however, that the court may still have questions about the contents of the calendars based upon affidavits alone. Many of the entries are simply initials or numbers, and because of the large number of entries in Stone's calendars it proved to be difficult to identify all the entries line by line. Counsel stated to the Court,

> It may be that the court may have some questions, just when reading, say affidavits, looking at the documents. And then I think it would be appropriate for the court to conduct its own *in camera* investigation of these individuals . . . If Your Honor wanted to hear them to further explain or develop that.

In response to the inquiry of Petitioner's counsel, the District Court answered affirmatively to the proposition

that an examination of the individuals themselves should occur if the court did not understand the contents of the calendars with the aid of the affidavits alone. At the conclusion of the hearing the court again left open the possibility of *in camera* testimony to explain the calendar entries. Despite these assurances from the court, however, Stone and Wujkowski were denied the protection of the Fifth Amendment because the lower court held that they had inadequately explained the entries in the calendars. If the court was unable to comprehend specific entries, Stone and Wujkowski should have been provided the opportunity to testify *in camera*. This was the procedure utilized in *In Re Grand Jury Subpoena d. April 23, 1981*, 522 F. Supp. at 979.

In *In Re Grand Jury Subpoena d. April 23, 1981*, the court employed an elaborate procedure to satisfy itself of the nature of the documents and the capacity in which they were held. In that case, testimony was heard *in camera* to satisfy the court of the nature of the documents. In the present case, the District Court did not allow testimony as to the nature of the documents, but simply held that the Petitioners had not met their burden because several entries were unexplained.

Other courts, when faced with a similar situation, recommend the taking of testimony. The court in *In Re Sealed Case*, Slip Opinion 91-3088 and 91-3089, (U.S. App. B.C. 1991) cites *United States v. Wujkowski* and *In Re Grand Jury Subpoena d. April 23, 1981*, and states, "For example, a personal secretary's testimony may be helpful in determining whether a calendar was kept simply as a personal convenience or was used by others in the agency in the conduct of their work." As the court there states, "In addition to checking the documents themselves, the trial judge might have gained reliable information about them by taking testimony from the subpoenaed witnesses and others." *Id.*

Likewise, in *United States v. Waltman*, 525 F.2d 371, 373 (3rd Cir. 1975) the court stated, "Since the testi-

mony of the individual respondent would presumably have been a factor of great significance in making this determination, it was highly desirable to provide him an opportunity to be heard without depriving him of his Fifth Amendment rights."

The present case does not involve the situation where the District Court was satisfied, based upon the submissions, that the calendars were definitely corporate documents held in a representative capacity. In this situation the court may have justifiably felt that testimony would add nothing of importance to its ruling. In the present case, however, the court admits that Petitioners met several criteria demonstrating that the calendars were personal documents. In addition, the court was unable to categorize the entries as corporate (App., p. 21). In the present case, it was an abuse of discretion not to provide Petitioners the opportunity to provide the court with more information. This is especially true considering that the court, on July 26, 1991, indicated that it would do precisely that.

CONCLUSION

For the foregoing reasons, Petitioners John T. Stone, Jr. and Roy A. Wujkowski respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

RICHARD MURRAY *
CHRISTIAN D. ABEL
CARMEN A. JACOBS, JR.
MURRAY, JACOBS & ABEL
601 King Street, Suite 400
Alexandria, VA 22314
(703) 739-1340
Attorneys for Petitioners

* Counsel of Record

January 4, 1993

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2244

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

JOHN T. STONE, JR.; ROY A. WUJKOWSKI,
Respondents-Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(MISC-90-16-M, MISC-90-17-M)

Argued: June 5, 1992

Decided: October 6, 1992

Before WIDENER, SPROUSE, and WILKINSON, Circuit Judges.

Affirmed by published per curiam opinion.

COUNSEL

ARGUED: Richard Murray, MURRAY & PRICE, Washington, D.C., for Appellants. Lowell Vernon Sturgill, Jr., Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Christian D. Abel, Carmen Anthony Jacobs, Jr., MURRAY & PRICE, Washington, D.C., for Appellants. Stuart M. Gerson, Assistant Attorney General, Anthony J. Steinmeyer, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Kenneth E. Melson, United States Attorney, Paula Pugh Newett, UNITED STATES ATTORNEY'S OFFICE, Alexandria, Virginia, for Appellee.

OPINION

PER CURIAM:

In *United States v. Wujkowski*, 929 F.2d 981, 986 (4th Cir. 1991), we reversed the district court's judgment granting the government's motion for enforcement of subpoenas duces tecum issued to John Stone, Jr. and Roy Wujkowski. We remanded for an *in camera* review of the documents that were the subject of the subpoenas, and for a more specific finding whether they were business documents properly subject to the subpoenas or whether they contained personal entries protected by the Fifth Amendment's proscription against self-incrimination.

The facts of the case were reported in our previous decision and need not be detailed again. Briefly, the Department of Energy had conducted a prolonged investigation concerning the relationship of some of its employees to Technology and Management Services, Inc. (TMS), a frequent contractor with the Department. In response to the government's motion for enforcement, the

district court ordered Wujkowski and Stone, officers of TMS, to obey the Department's subpoena. It required them to produce:

> "all original desk and pocket calendars, appointment books, planner schedules, and daily meeting logs maintained or kept on a personal and/or business basis for calendar years 1985, 1986, 1987, 1988, and for the first three quarters of 1989."
>
> The subpoena directed to Wujkowski also demanded that he produce business records related to Ashford Associates [a company owned by Wujkowski] and records related to a beach home he owned. In regard to the beach house, the subpoena sought a list of names and addresses of all people who had used the house from 1983 to September 1989 and any correspondence related to its use. The Department contended that Wujkowski had allowed its employees to use the house in return for preferential treatment for his business interests.

Id. at 982 (quoting subpoena).

The district court, in its initial consideration of the government's motion for enforcement, had concluded that "the business related notations in the appointment books or calendars are corporate records." *Id.* at 984. We were of the view in the first appeal, however, that since the court had neither conducted an *in camera* review of the documents nor received any other information explaining whether they were business or personal, its conclusion was based on an inadequate finding of fact. *See In re Grand Jury Subpoena Duces Tecum Dated Apr. 23, 1981 Witness v. United States*, 657 F.2d 5, 8 (2d Cir. 1981); *In re Grand Jury 89-4 Subpoena Duces Tecum Dated Aug. 2, 1981*, 727 F. Supp. 265, 267-68 (E.D. Va. 1989); *In re Grand Jury Subpoena Duces Tecum Dated Apr. 23, 1981*, 522 F. Supp. 977, 979-80 (S.D.N.Y. 1981).

Our remand instructed the district court to give Wujkowski and Stone opportunities to demonstrate that the disputed items were personal and that the acts of production would involve testimonial self-incrimination. We noted that the burden of making these showings was on Wujkowski and Stone. On remand the district court conducted two hearings, considered arguments of counsel, and reviewed *in camera* the targeted documents and the affidavits of Wujkowski and Stone.

Regarding Stone, the court noted that his five pocket-sized diaries were for the years 1985 through 1989. It found that there were some unspecified personal entries but not enough to alter the character of the documents as business ones. Stone's affidavit was found not to address the vast majority of the entries. The court held that Stone failed to satisfy his burden of proving that the nature of the entries and the capacity in which he held the documents were personal.

The only Wujkowski calendars at issue were for the months of November and December, 1989. The court found that the entries were too cryptic to characterize as either personal or business, and that Wujkowski's affidavit was likewise insufficiently specific. We agree with the district court that Wujkowski and Stone did not meet their burden of establishing the personal nature of their diaries.

We turn next to Wujkowski's beach house records, which the district court, having conducted its *in camera* review, described as "statements of the rental agent, bills for public utilities, the telephone company, and the power company." We agree with the district court's conclusion that although the documents are personal, they are unprotected by the privilege against self-incrimination because their existence, possession, and authentication are a "foregone conclusion"; their production "adds little or nothing to the sum total of the Government's informa-

tion." *Fisher v. United States*, 425 U.S. 391, 411 (1976); *see United States v. Lang*, 792 F.2d 1235, 1241 (4th Cir.), *cert. denied*, 479 U.S. 985 (1986). As in *Lang*, the existence of the beach house records is not in dispute. Wujkowski makes no argument that he was not billed for the use of utilities at the beach house during the period at issue, or that he did not rent the house to other people. Indeed, the Department possessed sufficient knowledge that Wujkowski had rented out the house between 1983 and September 1989 to request a list of people who had used the house during that period. *Cf. Lang*, 792 F.2d at 1241 (existence and possession of loan agreements were a foregone conclusion where government had sufficient prior knowledge about the agreements to make a specific request for them). Also as in *Lang*, Wujkowski's possession of the records is not disputed. As the owner of the house, it is a foregone conclusion that he would have the utility bills and rental records for the house. Finally, assuming that Wujkowski would authenticate the beach house records by producing them,* *see* Fed. R. Evid. 901; *United States v. Grande*, 620 F.2d 1026, 1035 (4th Cir.), *cert. denied sub nom. Berg v. United States*, 449 U.S. 919 (1980), the authentication is a foregone conclusion if someone else can verify that the records are in fact what they purport to be. *Lang*, 792 F.2d at 1241; *United States S.E.C. v. First Jersey Secs., Inc.*, 843 F.2d 74, 76 (2d Cir. 1988). The district court held that the beach house documents "could easily be obtained from the utilities involved," and by "utilities" it is clear that the court was including the rental agent. Wujkowski offered no evidence to support his argument that the documents contained "rental information which would not be

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* If Wujkowski's production of the records is insufficient to authenticate them, there is no self-incrimination. *See Fisher*, 931 U.S. at 413; *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985).

available from any utility." In view of Wujkowski's sparse factual input, we, of course, cannot say that the district court made an erroneous factual conclusion that the records could be authenticated by the utilities and the rental agent.

We also affirm the district court's holding that Wujkowski's status as the sole shareholder, director, officer, and employee of Ashford Associates did not excuse him from the duty of producing Ashford corporate documents that he held in his representative capacity. In *Braswell v. United States*, 487 U.S. 99 (1988), the Supreme Court stated:

> We leave open the question whether the agency rationale [that a person subpoenaed as a representative of a corporation acts as an agent and not an individual when he produces corporate records] supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

Id. at 118 n.11. We believe the district court correctly answered the question left open in *Braswell*.

The privilege against compulsory self-incrimination is, of course, personal, and does not apply to collective entities, such as corporations. *Bellis v. United States*, 417 U.S. 85, 89-90 (1974). Ashford is a one-man operation; however, it is still a corporation, a state law-regulated entity that has a separate legal existence from Wujkowski shielding him from its liabilities. The business could have been formed as an unincorporated sole proprietorship and production of its business records protected by the privilege against self-incrimination. *See United States v. Doe*, 465 U.S. 605, 608 (1984). Wujkowski chose the corporate form and gained its attendant benefits, and we hold, in accord with the decisions of sister circuits, that

he cannot now disregard the corporate form to shield his business records from production. *United States v. Lawn Builders of New England, Inc.*, 856 F.2d 388, 394 (1st Cir. 1988); *In re Grand Jury Proceedings (John Doe Co.)*, 838 F.2d 624, 627 (1st Cir. 1988); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 148 (6th Cir.) (en banc), *cert. denied*, 474 U.S. 1033 (1985); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 59 (2d Cir. 1985).

Accordingly, the district court's judgment is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 90-3132, 90-3135 and 90-3146

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROY A. WUJKOWSKI,
Defendant-Appellant
(Two Cases).

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN T. STONE, JR.,
Defendant-Appellant.

Argued Jan. 8, 1991

Decided April 2, 1991

Richard Murray, argued (Carmen A. Jacobs, Jr. and Christian D. Abel, on brief), Murray & Price, Washington, D.C., for defendants-appellants.

Lowell V. Sturgill, Jr., Civ. Div., U.S. Dept. of Justice, Washington, D.C., argued (Stuart M. Gerson, Asst Atty. Gen., Anthony John Steinmeyer, Civ. Div., U.S. Dept. of

Justice, Washington, D.C., and Henry E. Hudson, U.S. Atty, Alexandria, Va., on brief), for plaintiff-appellee.

Before WIDENER, SPROUSE and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

This case presents recurrent issues in Fifth Amendment jurisprudence: which individuals or entities are eligible to invoke the privilege against self-incrimination and what types of materials are protected by the privilege. The dispute over these issues arises from a classic confrontation between the subpoena power of a government agency and the asserted Fifth Amendment rights of those individuals targeted by the subpoena. Here, the Department of Energy, as part of an investigation into alleged corruption among its employees and contractors, subpoenaed documents from appellants who are officers of corporations doing business with the Department. Appellants resisted the subpoenas on the principal ground that the documents sought by the Department were personal and shielded by the privilege against self-incrimination. The district court rejected appellants' Fifth Amendment claims and ordered the subpoenaed documents to be relinquished to the government.

Appellants now argue that the district court should have been more thorough both in its examination of the documents and in its examination of the legal issues involved in the case. We agree and remand the case for further proceedings consistent with the directions set forth herein.

I.

For several years the Department of Energy through its Inspector General has been investigating allegations that one of its contractors, Technology and Management Services, Inc. ("TMS"), gave gratuities to Department employees in return for favorable treatment on contracts and mis-

charged the Department on contracts. Appellants John Stone, Jr. and Roy Wujkowski are officers of TMS. In addition, Wujkowski is the owner of Ashford Associates, Inc. Ashford provided services to Department contractors and is now under investigation on charges of corruption similar to those leveled against TMS.

As part of the Department's investigation, it issued subpoenas duces tecum to Stone and Wujkowski. The subpoenas contained a similar demand to produce:

> all original desk and pocket calendars, appointment books, planner schedules, and daily meeting logs maintained or kept on a personal and/or business basis for calendar years 1985, 1986, 1987, 1988, and for the first three quarters of 1989.

The subpoena directed to Wujkowski also demanded that he produce business records related to Ashford Associates and records related to a beach home he owned. In regard to the beach house, the subpoena sought a list of names and addresses of all people who had used the house from 1983 to September 1989 and any correspondence related to its use. The Department contended that Wujkowski had allowed its employees to use the house in return for preferential treatment for his business interests.

Wujkowski and Stone refused to comply with the subpoenas, asserting their Fifth Amendment rights against self-incrimination. The Department moved to enforce the subpoenas in district court. The court ordered Wujkowski and Stone to submit the pocket calendars and planner schedules sought in the subpoena for an *in camera* review to determine whether the materials were corporate or personal. They complied with this order. The Department then argued that the court should reconsider its order because new case law made an *in camera* review unnecessary.

On July 27, 1990, the court ruled summarily that such a review was unnecessary and that the contents of the calendars and schedules were not protected by the privilege against self-incrimination. In addition, the court held that any business notations in these materials were corporate records and that the privilege does not protect the act of producing corporate records. The court also concluded that the act of producing any personal notations in these materials did not create any additional threat of self-incrimination beyond the unprivileged act of producing the corporate notations. The court apparently believed that the statements of these general propositions relieved it of the need to conduct any real examination of the documents at issue or to explain why the act of production of any materials which might be personal failed to implicate the protections of the privilege. As part of its judgment, the court allowed the Department to take possession of the materials originally submitted for *in camera* review. Similarly, the court ordered Wujkowski and Stone to relinquish any additional items called for by the common language of their subpoenas. They now appeal the court's judgment.

The court also ordered Wujkowski to produce the subpoenaed documents pertaining to Ashford Associates and to the beach house. Wujkowski refused to comply with the order and the court held in contempt. He now appeals the court's order requiring him to turn over these documents.

These appeals have been consolidated for review. Wujkowski and Stone maintain that both the contents of the subpoenaed documents and the act of producing them are privileged. The Department argues primarily that nothing about the documents or the act of producing them is privileged and that, in any event, its regulatory interests diminish any Fifth Amendment privilege to which the appallants may otherwise be entitled. We shall address each argument in turn.

II.

Two approaches have been advanced for determining whether a Fifth Amendment privilege can be claimed for a particular document. Fifth Amendment analysis initially focused on whether the contents of a subpoenaed item would be self-incriminating. *See Bellis v. United States*, 417 U.S. 85, 87, 94 S.Ct. 2179, 2182, 40 L.Ed.2d 678 (1974). More recently, the focus of the privilege inquiry has shifted to whether the act of production associated with relinquishing an item would be self-incriminating. *Fisher v. United States*, 425 U.S. 391, 410, 96 S.Ct. 1569, 1581, 48 L.Ed.2d 39 (1976).

The case law now makes plain that appellants' claim of a privilege broadly based on the contents of appointment books and on beach house records must be rejected. *See United States v. Mason*, 869 F.2d 414, 416 (8th Cir. 1989); *In re Steinberg*, 837 F.2d 527, 530 (1st Cir.1988). "[A] person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Baltimore City Dep't of Social Serv. v. Bouknight*, 439 U.S. 549, 110 S.Ct. 900, 905, 107 L.Ed.2d 992 (1990). This is so because "when the government demands that an item be produced, 'the only thing compelled is the act of producing the [item]." *Id.* (*citing Fisher*, 425 U.S. at 410 n.11, 96 S.Ct. at 1581 n. 11). The district court was therefore correct to conclude on the facts of this case that the contents of appellants' documents could not support a claim of privilege.

Wujkowski and Stone also contend the court erred in concluding that they could not claim act of production privileges for the subpoenaed documents. It is well settled that an individual may claim that his act of producing his own materials implicates his Fifth Amendment rights. *Bouknight*, 110 S.Ct. at 905. In contrast, a collective entity such as a corporation has no Fifth Amendment

rights and the corporation and its officers cannot resist the production of corporate records on self-incrimination grounds. *Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988) "The official records and documents of the organization that are held by [its officers] in a representative rather than in a personal capacity cannot be the subject of the personal privilege against selfincrimination, even though production of the papers might tend to incriminate them personally." *United States v. White*, 322 U.S. 694, 699, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542 (1944).

The logic behind this rule is that records of a corporation belong to the corporation and that the holder of the records is simply a custodian who has assumed a duty to produce the records upon proper demand by the government. *Braswell*, 487 U.S. at 108-14, 108 S.Ct. at 2290-93. Accordingly the act of production is ascribed to the corporation and not to the individual. *Id.* at 117-18, 108 S.Ct. at 2294-95. To be sure, a person does not forfeit his or her Fifth Amendment rights merely by accepting employment with a corporation rather these rights are inapplicable when an employee holds the corporations' records in a representative capacity.

Thus, the crucial distinction for act of production purposes is between personal documents and corporate documents held by agents in a representative capacity. While in some cases it is quite easy to draw the necessary distinctions, in other cases it can be more difficult to determine whether a document is personal or corporate. *See In re Grand Jury Investigation*, 600 F.Supp. (D.Md.1984).

III.

Here, the district court concluded that "the business related notations in the appointment books or calendars are corporate records." And the court seems to have assumed that the beach house records were corporate also.

We agree with appellants that the court should have conducted a more extensive inquiry into the documents themselves before reaching these conclusions.

A.

Stone did acknowledge that there were business as well as personal notations in this appointment books and calendars. Yet given that an *in camera* review of the submitted materials was never conducted, we have difficulty knowing on what basis the court concluded that Wujkowski's appointment books and calendars contained business notations. The Department suggests that we should simply presume that appointment books and planners will contain business notations. In our view, basing a decision on such a presumption is inappropriate when a constitutional privilege hangs in the balance. We cannot state categorically that such things as appointment books, day planners, and pocket calendars are intrinsically either corporate or personal in nature. The subpoena itself appears to confirm the difficult of generic characterization by asking for documents held on a "personal and/or business basis." Even if there are business related notations in the appointment books and pocket planners, this does not mean that these materials are invariably unprivileged because the question remains whether the documents were held in a representative or personal capacity. *See In re Grand Jury Subpoena v. United States*, 657 F.2d 5 (2d Cir.1981).

Based on these concerns, we believe the district court must conduct a more detailed inquiry into whether the pocket planners and appointment books in this case should be classified as corporate or personal. Of course, the burden will be on Wujkowski and Stone to prove the nature of the documents and the capacity in which they held them. *See, e.g., In re Grand Jury 89-4 Subpoena Duces Tecum*, 727 F.Supp. 265 (E.D.Va.1989). The Second Circuit's decision *In re Grand Jury Subpoena v. United States* pro-

vides a useful framework for the inquiry to be conducted on remand. The court there provided this nonexhaustive lise of factors to aid in assessing whether a document is corporate or personal; who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to or in furtherance of the conduct of the corporation's business. 657 F.2d at 8. *See also In re Grand Jury Subpoena dated April 23, 1981*, 522 F.Supp. 977 (S.D.N.Y.1981) (implementing the Second Circuit factors on remand). Carrying out this inquiry will insure that a few personal notations scrawled in an obviously corporate document will not convert the document into a personal one and at the same time insure that every writing made by a corporate executive is not transformed into a corporate document.

B.

We voice similar concerns about the beach house records. A mere allegation by the Department that Wujkowski's house was used to further his business interests does not automatically transform the records of this ostensibly private residence into corporate documents. Here again, *In re Grand Jury Subpoena* is a useful aid in the inquiry into whether Wujkowski is entitled to claim an act of production privilege for the beach house materials. On remand, the court must examine these records for evidence establishing a link between the house and the corporations. For example, evidence of a financial link between the corporations and the house, such as corporate reimbursement of Wujkowski for expenses associated with the house, might help to establish that the materials pertaining to the house are corporate. Evidence of corporate hospitality or of the conduct of corporate business at the dwelling would also be relevant. If the home was used for these purposes, it makes the records pertaining to the house more like corporate documents held in a representative capacity.

If the district court determines that any of the items in dispute in this case should be classified as personal, Wujkowski or Stone should be provided the opportunity to show that his act of producing these items would entail testimonial self-incrimination. This now familiar inquiry centers on whether producing the items would testify to their authenticity, existence, or possession by the defendant. *Fisher*, 425 U.S. at 410, 96 S.Ct. at 1581. The Department, of course, could attempt to rebut appellant's claim by "producing evidence that possession, existence, and authentication were a 'foregone conclusion.'" *Doe v. United States* 465, U.S. 605, 614 n.13, 104 S.Ct. 1237, n. 13, 79 L.Ed.2d 552 (1984). "These questions perhaps do not lend themselves to categorical answers their resolution; may instead depend on the facts and circumstances of particular cases or classes thereof." *Fisher*, 425 U.S. at 410, 96 S.Ct. at 1581. We cannot tell at this preliminary stage whether the act of production would really be sufficiently testimonial and incriminatory to require protection. *Bouknight*, 110 S.Ct. at 905. Consequently, the district court should be the one to undertake such a fact dependent inquiry, is such an inquiry becomes necessary.[1]

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[1] The act of production inquiry with respect to the Ashford Associates documents is a somewhat different one. We face no problems of characterization with respect to these documents because Wujkowski acknowledges that he holds them as corporate records in a representative capacity. He nonetheless claims that he fits the one narrow circumstance in which an act of production privilege could conceivably be claimed with respect to corporate records. *Braswell* left open the question whether the custodian could be compelled "to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records." 487 U.S. at 118 n. 11, 108 S.Ct. at 2295 n. 11. Upon remand, we think the district court must address whether Wujkowski in fact falls within this area of open inquiry and, if so, how the question left open by *Braswell* should in its judgment be resolved.

IV.

We recognize the Department's significant interest in detecting any wrongdoing among its employees or those who do business with them. We cannot accept, however, the Department's argument that it has a "compelling interest in investigating fraud" that "far outweighs the reduced interests of Wujkowski and Stone in asserting the Fifth Amendment's privilege." Its reliance on *Bouknight* here is unavailing. In *Bouknight*, the Court held that the ability of a child's custodian to resist production of that child on Fifth Amendment grounds was diminished because the child was "the legitimate object of the government's non-criminal regulatory powers." 110 S.Ct. at 906. In *Bouknight* itself, the Court noted that the custodian, by virtue of being appointed by the state, assumed a duty to the state to produce the child for inspection. Here, unlike many of the cases underlying the holding in *Bouknight*, the government does not contend that appellants were required to maintain the documents it seeks or to submit them for inspection as conditions of doing business with the government.

Nor is the Department simply enforcing a non-criminal law regulatory regime akin to that in *Bouknight*. Any wrongdoing by the contractors, either in providing employees unlawful gratuities or in fraudulent billing practices, might well be the basis for criminal charges. Indeed, the Department would be remiss if it failed to perform its duty "to report expeditiously to the Attorney General" whenever it discovers possible criminal violations. Inspector General Act, 5 U.S.C.App. 3 § 4(d) (1988). The efforts undertaken in this case thus have the aura of a criminal investigation. The Department's regulatory interests, therefore, do not negate appellants' abilities to invoke the privilege. *See Marchetti v. United States*, 390 U.S. 39, 57, 88 S.Ct. 697, 707, 19 L.Ed.2d 889 (1968).

V.

We repeat that the government has a substantial interest in pursuing white collar crime among its contractors, but the pursuit of such crime cannot be permitted to overwhelm constitutional protections. Granting appellants a fuller hearing in this case will protect their rights with little appreciable impact on the government's ability to investigate corruption. We express no view at this point as to whether the relevant documents are corporate or personal or whether the production of any documents found to be personal would implicate the Fifth Amendment privilege. We hold only that the district court must undertake a more careful examination of the documents in question and provide a basis for its findings.

REMANDED WITH DIRECTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action Nos. 90-16-M and 90-17-M

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN T. STONE, JR. and ROY A. WUJKOWSKI,
Respondents.

MEMORANDUM OPINION

[Filed September 11, 1991]

These actions are before the court on remand from the United States Court of Appeals for the Fourth Circuit. *United States* v. *Wujkowski*, 929 F.2d 961 (4th Cir. 1991). After some delay occasioned by the unopposed motion of the United States for a stay pending the decision of the Solicitor General whether to petition for certiorari,[1] the respondents, on or about August 26, 1991, and pursuant to the court's order of July 26, 1991, submitted the documents at issue in the case for *in camera* review. The submission was accompanied by affidavits of both respondents.

The court has examined the documents.

The documents fall into three categories: pocket calendars, records of the beach house, and the records of Ashford Associates, Inc.

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[1] The government notified the court on June 28, 1991, that it did not intend to apply for certiorari.

The Court of Appeals rejected the respondents' arguments that there was a Fifth Amendment privilege to resist production based on the content of the documents. There remains, however, the question whether the act of producing the documents is privileged.

Since the capacity in which the documents are held is determinative of the right to claim the "act of production" privilege, the court has, consistent with the decision of the Court of Appeals, examined the documents with a view to making this determination.

A. Pocket Calendars [2]

1. Stone

The court has examined the pocket diaries for respondent Stone for the calendar years 1985 through the third quarter of 1989. The entries are contained in five leather bound pocket size (approximately 3″ x 7″) calendars with spaces for entries for each day. As conceded by Stone, these appointment books or calendars contain both personal and business entries. As noted by the Court of Appeals, the burden is on Stone to prove the nature of the documents and the capacity in which they were held. *Wujkowski*, 929 F.2d at 984. To discharge this burden, Stone has filed an affidavit attesting to the entries in the pocket diaries being in his own handwriting that they refer to scheduled meetings, notes, addresses and telephone numbers of individuals, appearance in this court in an unrelated case, and stock value notations regarding Stone's pension plan. No more detail than this is given as to specific entries, and the calendars themselves reveal

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[2] The original of these documents were apparently sent to counsel for the government by the Court of Appeals. The court has retrieved the documents from the government. Given the issues in the case it is somewhat surprising to find these documents in the possession of the government. Apparently they have been there since early on in the proceeding.

an overwhelming majority of entries that do not fit within any of the categories outlined by Stone's affidavit.[3] No explanation is given for any specific entry except an August 1, 1986 entry for a court appearance involving Stone's stepdaughter. The affidavit further attests to the diaries not having been given to Stone or required to be kept by the corporation; that the diaries were given to Stone by friends as Christmas gifts; that use of such diaries preceded his employment by Technology & Management Services, Inc. (TMS); that the entries are in effect personal reminders of events and information; that the calendars were always in Stone's possession; that no one else had access to them; and that the reason for keeping the documents was entirely personal and not necessary to the conduct of the business of TMS.

Although Stone has established some of the criteria which were held in *In re: Grand Jury Subpoena* v. *United States*, 637 F.2d 5, 3 (2nd Cir. 1981), to be factors to aid the court's determination whether the document is corporate or personal, he has singularly failed in his effort to identify the "nature of its contents" as personal other than in a conclusory non-specific way. The court finds that all that Stone has established is that over a period of four and three-quarter years there are some unspecified personal, non-business related entries in the diaries. This is not enough to convert the documents into personal ones. *Wujkowski*, 929 F.2d at 985.

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[3] Many entries merely have a number (e.g., January 7, 14; February 11, 12, 15, 1985; April 21, 22, 23, 1986; May 6, 1987; July 11, 12, 1988). Others have only initials such as SAI, ORNL, STI, AHP, NPC paper, CCT, FMR, AER, and BPO (e.g., January 7, 15; July 26, 30, 1985; May 30, 1986; July 22, 1986; February 24, 1987; November 17, 1986; January 5, 1987). Some of these initials are accompanied by numbers. The initials DOE also appear frequently. This probably refers to the Department of Energy, which, of course, is related to the Inspector General's inquiry. Many others have only a name. All such entries are unaccompanied by an explanation. Such descriptions, without more, are meaningless and render it impossible to determine the nature of the entry.

2. Wujkowski

The only calendars of Wujkowski which are at issue are for the months of November and December, 1989, and the court has examined the documents containing entries for those times. It is a spiral notebook type of diary with two pages for each month. Wujkowski's affidavit with respect to the calendars is substantially identical, and no more specific, than that of Stone. Given the brief period covered by the calendars, it would have been a relatively simple task to identify the entries as personal, if personal they were. Without elaboration the entries are too cryptic to enable the court to determine whether they relate of personal or corporate affairs. As indicated, there is no elaboration. For the same reasons as set forth in the discussion of the Stone pocket calendars, the court finds that Wujkowski has made an insufficient showing to convert the documents into personal ones.

B. Beach House Records

The beach house is apparently owned by respondent Wujkowski individually.

An examination of the beach house records reveals no link between the beach house and any of the corporations. The records consist of statements from the rental agent, bills for public utilities, the telephone company, and the power company. All of these are in the name of and billed to Wujkowski individually and alone.

The court concludes that these records are not held by Wujkowski in a representative capacity. Their production would attest to their authenticity, existence and possession by the defendant. *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). Yet the innocuous nature of the documents and that they could easily be obtained from the utilities involved, persuades the court not only that the authenticity, existence and possession of the documents were a "foregone conclusion," *Doe* v. *United States*, 465

U.S. 605, 614, n. 13 (1984), but the action of production is insufficiently testimonial or incriminatory to require protection. *Baltimore City Dept. of Social Services* v. *Bouknight*, 493 U.S. 549, 110 S.Ct. 900, 905 (1990).

C. Ashford Associates

These documents are admittedly held by Wujkowski in his representative capacity. The issue on remand is whether Wujkowski, because he is the sole shareholder, officer, director and employee of Ashford, would be deemed to have possessed the documents by a jury which was told that the corporation had produced the records.

As pointed out by the Court of Appeals, the Supreme Court in *Braswell* v. *United States*, 487 U.S. 99, 118, n. 11 (1983), left open the question whether Wujkowski under these circumstances could be compelled to produce the records in the face of an "act of production" assertion of privilege.

The government cites *Grant* v. *United States*, 227 U.S. 74, 79-80 (1913), for the proposition that a sole stockholder had no Fifth Amendment privilege to refuse to produce corporate documents. The question of "act of production" immunity was not before the *Grant* court, and the court does not find it dispositive. Pre-*Braswell* authority, however, persuades the court that the one man corporation relationship between Wujkowski and Ashford does not permit a successful assertion of the "act of production" privilege. *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52 (2nd Cir. 1985), rejected the same proposition advanced by Wujkowski, and the court finds that case persuasive.

Thus while the court finds that Wujkowski is the sole employee and officer of Ashford, it concludes that this does not permit an assertion of the "act of production" privilege.

Conclusion

The court concludes that the government is entitled to enforcement of the subpoenas in their entirety, unimpeded by the "act of production" privilege sought to be asserted by either Stone or Wujkowski.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 11th, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action Nos. 90-16-M and 90-17-M

UNITED STATES OF AMERICA
Petitioner,

v.

JOHN T. STONE, JR. and ROY A. WUJKOWSKI,
Respondents.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is ORDERED that:

1. Respondent Roy A. Wujkowski comply forthwith with the administrative subpoena issued by the Inspector General of the Department of Energy on November 22, 1989.

2. Respondent John T. Stone, Jr., comply forthwith with the administrative subpoena issued by the Inspector General of the Department of Energy on November 22, 1989.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 11th, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action Nos. 90-16-M and 90-17-M

UNITED STATES OF AMERICA
Petitioner,
v.
JOHN T. STONE, JR. and ROY A. WUJKOWSKI,
Respondents.

MEMORANDUM OPINION AND ORDER

[Filed July 27, 1990]

Pursuant to the court's July 6, 1990 and July 18, 1990 orders, the respondents in these subpoena enforcement proceedings have submitted for *in camera* review their appointment books and day planners. At the same time the United States has filed a motion for reconsideration of that portion of the orders which called for *in camera* review.[1]

The government relies on *Baltimore City Dept. of Social Services* v. *Bouknight*, 110 S.Ct. 900 (1990), for the proposition that the contents of documents such as the ones at issue here are not prohibited by the Fifth Amendment because the only thing compelled is the act of producing them. *Id.* at 905; *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). The court agrees that these cases eliminate any necessity for an *in camera* review of the contents of the documents to determine which parts, if any, are personal, because these documents were not created under government compusion.

[1] The motion also seeks to have the court hold the Respondent Wujkowski in contempt for failure to comply with the remaining portion of the order which ordered enforcement of the subpoena. The court is unwilling to enter a contempt order except after notice and an opportunity to be heard. If the government desire to pursue this, it should notice the motion for hearing.

There remains, however, the issue whether the act of producing the documents constitutes testimonial evidence of their existence, possession or authenticity. The business related notations in the appointment books or calendars are corporate records and there is no privilege against their production. *Braswell* v. *United States*, 487 U.S. 99, 109 (1988). As to the personal notations, there is no additional threat of self-incrimination by production beyond what is already implicated by the unprivileged production of the business aspect of the documents. Moreover, as stated in *Fisher*, 425 U.S. at 411:

> It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment.
>
> . . . .
>
> The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.

These comments aptly describe the situation of the respondents here.

The motion for reconsideration is granted; no *in camera* review of the submitted documents will be conducted; and respondents are directed to comply forthwith with those portions of the subpoenas which require the production of calendars, appointment books, planners and meeting logs in the possession of respondents.[2]

And it is so ordered.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 27th, 1990

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[2] The documents submitted *in camera* are in the possession of the Clerk's Office and may be picked up by counsel for the government.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

August 15, 1990

MEMO TO COUNSEL RE:

United States v. Charles Bendersky
Civil No. JFM-90-1346

Dear Counsel:

I have reviewed the government's Rule 59(e) motion and its accompanying memorandum. The motion is denied.

I continue to be of the view that the subpoena is overbroad on its face. As framed, it would have required the production of purely personal diaries and calendars. It did not have to be drafted so broadly in order to cover the type of documents which the Inspector General now argues he desires to have produced. For example, it could have sought the production of all calendars, diaries, etc. in respondent's possession, custody or control containing any notations relating to any appointments which respondent scheduled, any meetings which he attended or any other transactions in which he engaged as a representative of TMS or other business entity.

To the extent that the government's motion raises any other issue, it misses the mark. I have not ruled that any calendars, diaries, etc. are not producible because they are "mixed" documents, i.e. containing personal as well as business notations. Indeed, I am of the view that the "mixed" nature of a document is not a bar to its production. A person cannot render non-producible a document which otherwise would have to be produced by placing personal notations upon it. Further, I express no substantive disagreement with Judge Bryan. I simply have not reached the *Bouknight* issue which he has decided.

In my view a sensitivity to, and respect for, the right against self-incrimination among government officials are

essential safeguards to its preservation. Prosecutors and investigators, as well as the courts, have a responsibility to assure that a person's constitutional rights are not jeopardized. Accordingly, although subpoenas certainly must be broad enough in their terms to cover all relevant, non-privileged materials, they should not, in my judgment, be so broad that they self-evidently invade a constitutionally protected domain. In this case it is such a subpoena which I am being asked to enforce, and I will not enforce it. Of course, as I indicated in my original memorandum, if the Inspector General chooses to issue a more carefully drafted subpoena, the unresolved issues which have been raised in this proceeding can be revisited.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

cc: Court File